B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, Second Judicial Department made on June 15, 1970 as aforesaid, and annexed hereto as Appendix A.

C. Questions Presented for Review

1. Does it violate due process of law or the privilege against self-incrimination for a Grand Jury in one county to subpoena a witness who has already been punished for refusal to answer questions before a Grand Jury in another county and propound the same questions to him for which he had already been punished and, to then punish him again when he refuses to answer the same questions for which the other Grand Jury had punished him?

2. Does it violate the constitutional right the assistance of counsel to deny a witness whose presence before a Grand Jury is compelled by subpoena the right to have his counsel physically present with him in the Grand Jury room in order to protect his legal rights when he is being interrogated therein?

D. Constitutional Provisions and Statutes Involved

The constitutional provisions involved herein are those portions of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution relating respectively to

the privilege against self-incrimination, to the right to the assistance of counsel and to due process of law.

The statute involved is Section 750 of The New York Judiciary Law dealing with punishment for contempt of Court in refusing to answer lawful interrogatories.

Pertinent parts of each of the foregoing are set forth verbatim in this petition as Appendices C, D, E and F respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

The petitioner, PHILIP RASTELLI, had been subpoenaed to appear before the Grand Jury in Kings County to give testimony. Pursuant to that subpoena, petitioner appeared and the matter was adjourned on several occasions. The purpose of the adjournments was to allow him to retain counsel. The petitioner, having obtained counsel, appeared pursuant to said subpoena and was informed that he had been given immunity from prosecution by the Grand Jury.

Thereupon, various questions were put to the witness. He was asked if he knew individuals by the name of Carlo Gambino, Paul Sciacca, Natale Evola, Jimmy Failla also known as Jimmy Brown, Joseph Columbo and Frank Mari. To each of those questions he stated that he declined to answer those questions on the ground that to answer would tend to incriminate him.

He was also asked the source of loans which he had previously stated he had received. He refused to answer that question upon the same ground.

He was thereupon excused and thereafter a motion was made returnable in the Supreme Court of Kings County to punish him for contempt under §750 of the Judiciary Law of the State of New York by reason of the foregoing refusal to answer.

An answering affidavit was interposed by him in opposition to that motion. Said answering affidavit is appended to this petition as Appendix G. In opposing said motion to punish him for contempt, the petitioner stated:

> "The purpose and motive in offering me this immunity was in effect to provide a basis for the District Attorney to punish me either for contempt or for perjury when in fact he had no evidence of my committing any substantive crime. I, therefore, would request the privilege of being returned to the Grand Jury with my counsel present in the Grand Jury at the time that I am being called upon to testify in the same way that I would be entitled to have my counsel present when I am being questioned in connection with any substantive crime."

Petitioner further pointed out in said affidavit that at the same time that he was under subpoena to appear before that Grand Jury in Kings County, he was also subpoenaed by a Grand Jury in Nassau County. The stated purpose of the Nassau County Grand Jury was to investigate various crimes in connection with an inquiry into the alleged take-over of an organized crime syndicate. This was the same purpose for which the Kings County Grand Jury had subpoenaed him.

Petitioner further pointed out that he had appeared before the Grand Jury in Nassau County and, asserting

his Fifth Amendment privilege, had refused to answer questions on January 16, 1970 and had been adjudged in contempt of Court by reason thereof. He was sentenced to serve a term of Thirty (30) days imprisonment in Nassau County which term he had in fact served.

Petitioner further pointed out that the same questions which resulted in his punishment for contempt in Nassau County were the very questions which were again being asked of him before the Kings County Grand Jury. It was the contention of the petitioner that the Grand Jury was not asking the questions of him in good faith in promoting their own inquiry, but, rather, that the District Attorney was propounding such questions knowing full well that he had refused to answer those questions in Nassau County and that his being subpoenaed was essentially a device to further commit him for contenrpt, knowing that the witness would again assert his Fifth Amendment privilege and refuse to answer.

More particularly, the petitioner deposed in said affidavit as follows:

> "As a further demonstration of the lack of good faith on the part of the Grand Jury and as illustration of another basis for the denial of this motion, profitable recourse must be had to the questions actually put to me before the respective Grand Juries. For ease of reference I will set forth photostatic copies of the actual pages of the questions before the respective Grand Juries. I will refer to the questions before the Brooklyn Grand Jury by the letter of the alphabet and the identical questions before the Nassau Grand Jury by number. In Brooklyn on the February 5, 1970

appearance I was asked on Page 55, 'Do you know an individual by the name of Paul Sciacca?', (see Exhibit "A"). In Nassau County I was asked, 'Do you know Paul Sciacca, also known as Paulie Shocks?', (see Exhibit "1"). In Brooklyn I was asked, 'Do you know Natale Evola?', (see Exhibit "A"). In Nassau I was asked, 'Do you know Natale Evola?', (see Exhibit "2"). In Brooklyn I was asked, 'Do you know an individual by the name of Frank Mari?', (see Exhibit "B"). In Nassau I was asked, 'Do you know Frank Mari?', (see Exhibit "3"). In Brooklyn I was asked from whom I received the loans of money, (see Exhibits "C" and "D"). In Nassau I was asked to fill out a financial questionnaire concerning my sources of money; (see Exhibit "4").

In short, the questioning was identical and the purpose is manifest. This is borne out by the paucity of the questions actually asked of me in Kings County. The few questions asked me in Brooklyn clearly indicate that information was not being sought in furtherance of an investigation, but merely a quick basis for once again adjudicating me in contempt."

By reason of the foregoing, petitioner prayed that the motion to punish him for contempt be denied or in the alternative, that a hearing be ordered to determine whether in fact the investigation in Kings County and the contempt proceedings based thereon, were instituted in good faith or designed to harass petitioner and punish him for asserting his Fifth Amendment privilege.

The Court rejected petitioner's arguments and adjudged petitioner in contempt and sentenced him to a term of

Thirty (30) days imprisonment and a fine of $250.00. A copy of the Order adjudging petitioner in contempt is annexed hereto as Appendix B.

No hearing was ordered by the Court as requested nor was petitioner permitted to return to the Grand Jury along with his counsel to be physically present therein while he was questioned.

There was submitted to the Courts below, along with the opposing papers, copies of petitioner's Grand Jury testimony before the Grand Juries in Kings County and in Nassau County which demonstrated the identical nature of the questioning by both Grand Juries in both counties.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York Second Judicial Department. Pending the determination of that appeal that Court stayed execution of the order below adjudging petitioner in contempt and imposing the aforesaid jail sentence and money fine.

Thereafter, on June 15, 1970, the contempt adjudication was affirmed without opinion by the Appellate Division.

Thereafter, an application was made to the Court of Appeals of the State of New York for leave to appeal to that Court. That application was denied on July 6, 1970. An application for a stay of the commitment order pending the filing of the petition for certiorari was denied by the New York Court of Appeals.

Thereafter, an application for a further stay of the commitment order was timely made to the Hon. John M. Harlan, an Associate Justice of this Court. On July 29, 1970 Mr. Justice Harlan granted such a stay upon condition

that this petition be filed in this Court on or before August 26, 1970. Mr. Justice Harlan endorsed on the application the following:

> "In light of the pendency for argument next term of No. 97, *Piccirillo v. New York*, I am constrained to grant a stay, conditioned however as provided in the order I am signing today. JMH 7/29/70"

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The constitutional issues presented herein, namely whether it violated due process of law and the privilege of self-incrimination to punish petitioner for contempt of Court in refusing to answer before a Kings County Grand Jury the same question which he had refused to answer before the Nassau County Grand Jury and for which he had already been punished by a Thirty (30) day jail sentence which he had served, and whether it violated petitioner's constitutional right to counsel by refusing to permit his attorney to be physically present in the Grand Jury room during petitioner's interrogation by the Grand Jury were raised at the earliest procedurally possible stage of the proceedings. Specifically, said issues were raised in the aforementioned affidavit in opposition to the District Attorney's motion to punish petitioner for contempt of Court by reason of his failure to answer the questions propounded before the Grand Jury.

G. Argument Amplifying the Reasons Relied on for Allowance of the Writ

POINT ONE

It was a violation of due process of law and petitioner's Fifth Amendment privilege to punish him for contempt in refusing to answer before a Kings County Grand Jury the same questions which he had already refused to answer before a Nassau County Grand Jury and for which he had already been punished by a jail sentence by reason of such refusal.

As indicated in the statement of the case *supra*, petitioner had been simultaneously subpoenaed to appear before two Grand Juries in near-neighboring counties, to wit, Kings County and Nassau County. The stated purposes of both Grand Juries was to inquire into an alleged conspiracy to take over an organized crime syndicate and related crimes.

Annexed hereto are the minutes of petitioner's testimony before the Nassau County Grand Jury (Appendix H) and the minutes of petitioner's testimony before the Kings County Grand Jury (Appendix I). An examination of the minutes demonstrates the identical nature of the questions posed by both Grand Juries.

As also indicated previously, the refusal to answer the questions before the Nassau County Grand Jury resulted in petitioner's incarceration under a Thirty (30) day sentence for contempt of Court. Petitioner's refusal to answer the same questions before the Kings County Grand Jury also resulted in a Thirty (30) days sentence (the

maximum sentence permitted), which latter sentence is the subject matter of this petition.

We recognize the right of the Grand Jury in respective counties to investigate crime in those counties. However, it is interesting to note in the instant case that the paucity of questions posed to this petitioner before the Kings County Grand Jury clearly indicate that the purpose could not have been investigation. This is further borne out by the fact that these identical questions had been posed to this witness before the Grand Jury in Nassau and he declined to answer them and was punished accordingly. It defies credulity to believe that the Nassau County District Attorneys Office and the Kings County District Attorneys Office would not be in communication and that the Kings County District Attorney would not be privy to the questions and to the witness' response.

It is respectfully submitted that the situation at bar was the situation anticipated by the New York Court of Appeals in the matter of the *Second Additional Grand Jury of the County of Kings* v. *Aurelius Cirillo*, 12 N.Y. 2d 206, 237 N.Y.S.2d 709. This is borne out by the language contained on page 211:

> "Of course, contempt adjudications based on the same refusals or evasions can be so numerous or onerous as to deny due process to the person questioned. Solution of that problem must await an appeal presenting the particular issue."

Our contention at bar is that the procedure of calling this petitioner in Kings County in such close proximity to his punishment in Nassau and asking him the same questions is a denial of his right to due process of law. Certainly, the

brevity and the repetitious nature of the questions clearly indicates that the true purpose was to punish him once again for his correctly anticipated assertion of his Fifth Amendment privileges.

It should also be noted in passing that the questions posed to him by the Kings County Grand Jury were not limited to activities in Kings County, but were merely restatements of the questions posed in Nassau County. It is respectfully submitted that the situation at bar is not dissimilar from the situation in *People* v. *Riela*, 7 N.Y.2d 571, 200 N.Y.S.2d 43. It is suggested that if this procedure is permitted to continue, that theoretically this petitioner can be repeatedly incarcerated by the Grand Juries of the respective neighboring counties by calling him, asking him the identical questions to which they know he will assert his Fifth Amendment privilege and then seeking to repeatedly punish him for thirty (30) days at a time. There is nothing to indicate that after he had been punished in the various metropolitan and adjoining counties the procedure could not be repeated and repeated resulting in continued incarceration in every county in the State of New York.

In short, what we are contending is that in the language of *Cirillo, supra,* the contempt adjudications are so numerous and onerous as to deny this witness Philip Rastelli due process.

To put the proposition another way, in the language of the *Riela* case, *supra,* the only limitation to be meted out to the witness herein is limited to the extent of the cooperation between the various District Attorneys' Offices. There is language contained in *People* v. *Riela, supra,* at page 577, which although involving a somewhat different fact pattern

is applicable at bar. This language was taken from the case of *Yates* v. *U. S.*, 355 U.S. 66:

> ". . . the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."

This principle is applicable at bar for all that is changed is that another District Attorney's Office within close proximity, both geographically and in time, has repeated the same questions in knowing anticipation of the petitioner's assertion of his Fifth Amendment privilege and is seeking to punish the witness therefor.

The net effect of this complained of conduct raises a serious question of the good faith of the various prosecutors in connection with this witness and should at least have given rise to the requested hearing to determine the true purpose and bona fide nature, if any, of the Kings County Grand Jury proceeding.

POINT TWO

It was a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury Room during his interrogation by the Grand Jury.

The constitutional right to the assistance of counsel has been greatly enlarged in recent years. More significantly, this Court has upheld the right to counsel in various critical situations apart from an actual trial (*Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *U. S.* v. *Wade*, 388 U.S. 218 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1968); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964)).

See also, Meshbesher, *Right of Counsel Before Grand Jury*, 41 F.R.D. 189.

The basic reason for denial by State Courts of the right to counsel inside the Grand Jury Room is the desire to preserve the secrecy of the proceedings. More specifically, this desire for secrecy is generally sought to be bolstered by corollary propositions:

1. To prevent escape by prospective defendants.
2. To prevent prospective defendants or others from seeking to importune grand jurors.
3. To prevent tampering with witnesses.
4. To encourage witnesses to testify uninhibitedly without fear of disclosure.
5. To protect the prospective defendant from disclosure to others of the existence of an investigation directed toward him.

See, *U. S.* v. *Procter and Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958); *U. S.* v. *Rose*, 215 F.2d 617, 628-629 (3 Cir., 1954).

None of these reasons would be applicable to the case at bar. The first three reasons are predicated upon the assumption that the prospective defendant is unaware of the Grand Jury proceedings. Such reasons are hardly supportable where, as here, the petitioner was brought before the Grand Jury under compulsion of subpoena by the prosecutor himself.

The fourth reason relates to keeping secret the identity and testimony of witnesses other than the petitioner. Such secrecy would be unaffected by the appearance of the petitioner.

The fifth reason contemplates improper disclosure of the proceedings by members of the Grand Jury or the prosecutor or other persons apart from the petitioner. New York Law does not prohibit a witness before a Grand Jury from disclosing the fact that he testified or the testimony given by him (*People* v. *Minet*, 296 N.Y. 315).

Thus, once a witness is brought before a Grand Jury, all of the reasons underlying the need for secrecy necessarily become meaningless *as to him*.

If we are correct in that aspect, it would also follow that the physical presence of his counsel in the Grand Jury Room simultaneously with him would in no way prejudice the secrecy requirements. What is known to the witness must be made known to his counsel. This would be particularly true where, as in this case, the witness' presence was secured by the compulsory force of a subpoena.

The right to the physical presence of counsel in the Grand Jury Room does not appear to have been directly considered by this Court. But see, *In re Groban*, 352 U.S. 330 (1957) and *Anonymous* v. *Baker*, 360 U.S. 287 (1959).

In *In re Groban*, this Court held valid an Ohio statute authorizing a Fire Marshal's right to exclude counsel's presence when questioning a witness at an investigatory proceeding to determine the cause of a fire. Analogy was drawn between the right to counsel before a Grand Jury and before "other investigatory bodies" (*id.* at p. 333). The Court noted that the right to counsel was not constitutionally mandated in either situation.

In *Anonymous* v. *Baker*, this Court, drawing the same analogy, held that a Court-ordered secret inquiry into unethical practices by attorneys did not constitutionally mandate a witness' right to have counsel present when being interrogated.

As indicated, *Baker* and *Groban* did not directly reach the issue raised herein. Nonetheless, while the language of those cases would appear to militate against petitioner's position herein, it might also be respectfully noted that they precede in point of time the entire series of Sixth Amendment opinions promulgated by this Court during the past decade.

We, therefore, respectfully urge that the issue herein raised squarely for the first time be considered by this Court.

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

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